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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EARL W. BRIAN,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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1428

QUESTIONS PRESENTED

1. Does the right to a direct appeal necessarily imply a right to a meaningful review, prohibiting a process in which form is followed to give the appearance that substance was considered? And is there a sufficient showing that a person has been denied the right to a meaningful appeal where, as here, the appellate panel's non-reasoned memorandum shows it failed to consider the serious and substantial issues raised on appeal, and the panel then issues an amended memorandum and the Petitioner is precluded from petitioning for a rehearing of the amended memorandum?

2. The sixth amendment guarantees a defendant a fair trial, and the due process clause helps secure that guarantee by requiring there be a "balance of power" between the state and the accused. Is a defendant denied a constitutionally fair trial where, as here, as a result of both a *de facto* and *de jure* imbalance in power:

- as its evidence of defendant's guilt, the prosecution relies on testimony it obtained through its one-sided ability to induce and reward witnesses for testimony it considers favorable;

- the prosecution introduces evidence of accounting losses to prove motive and then prevents the defendant from introducing evidence there were no actual losses and that he had no motive;

- the prosecution withholds from cross-examination the one witness it says has direct knowledge of the

defendant's guilt, and also successfully blocks introduction of the witness' plea agreement showing he is being rewarded by the prosecution for incriminating the defendant;

- after successfully excluding the witness' plea and cooperation agreement, the prosecution falsely tells the jury the witness is equally available to the defense;

- the prosecution is permitted to use leading questions on direct examination to establish the otherwise unproved essential element of guilty knowledge;

- the prosecution successfully objects throughout the trial that the testimony of defendant's expert witness is inadmissible, and then, after the defense rests, tells the judge that to avoid reversible error, he should change his ruling and say the testimony is admissible, and the judge does so;

- the prosecution presents testimony from a witness that incriminates the defendant, and then successfully prevents the defendant from introducing the witness' earlier taped recorded statements, made before he was given a cooperation agreement, which contradict his trial testimony and exonerate the defendant;

- at the request of the prosecutor, the court refuses the jury's request to read back several pages of testimony in which a key prosecution witness perjured himself, and makes numerous other biased, erroneous rulings in deference to the prosecution?

3. The amount of loss to lenders and the amount of loss to shareholders, determines whether Petitioner will spend 57 months in prison.

a. The government admitted pretrial that the lenders were made whole by the sale of assets and thus suffered no loss. The district court also rejected the lender's request for $15 million of restitution, because the loss that was the basis for the restitution request occurred as a result of the lender's mishandling of the collateral, after the lender acquired control and ownership of the collateral and which had been more than adequate to cover the lender. But the district court still used the requested restitution loss in calculating Petitioner's sentencing guideline range. Does due process, as well as the Sentencing Guidelines, prohibit using a loss incurred after a victim is made whole by the transfer of pledged collateral to increase the length of a defendant's imprisonment?

b. Petitioner presented an expert who, by taking into account all available information, explained there was no shareholder loss, but the district court instead used the value of the settlement paid to the shareholders in a civil suit as the amount of the shareholder loss for purposes of calculating Petitioner's guideline range. Does due process, as well as the Sentencing Guidelines, prohibit using the amount of shareholder gain from a civil suit as the amount of the shareholder loss for purposes of calculating a defendant's sentencing guideline range and length of imprisonment?

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ORDERS OF THE DISTRICT AND CIRCUIT COURT

The following orders and memoranda entered in the case by the Court of Appeals for the Ninth Circuit are unreported and are reproduced in the appendix as specified: order granting Petitioner bail pending appeal (September 16, 1997), Appendix ("App") A-1; order granting Petitioner and Respondent permission to file an oversized brief (March 3, 1998), App B-2; order directing appeal be submitted on the briefs without oral argument (September 29, 1998), App C-3; order reaffirming order directing appeal be submitted on the briefs and denying request for oral argument (October 5, 1998), App D-4; Memorandum Disposition (October 14, 1998), App E-5; order granting permission to file an amicus brief in support of petition for rehearing (December 3, 1998), App F-8; order directing Respondent to file a response to petition for rehearing (December 3, 1998), App G-9; order amending Memorandum Disposition and denying petition for rehearing (March 11, 1999), App H-10; amended Memorandum Disposition (March 11, 1999), App I-17; order denying request for publication (May 24, 1999), App J-23.

The May 20, 1997, judgment entered in the case by the district court, which includes its concurrent order denying the request for restitution, is unpublished and is reproduced at App K-24.

JURISDICTION

Petitioner seeks review of the Ninth Circuit Court of Appeals' amended memorandum disposition and order affirming Petitioner's conviction and sentence, and its simultaneous order denying rehearing and rejecting the suggestion of rehearing en banc which were filed March 11, 1999. App H-10 & I-17.

In seeking this review, Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Introduction & Overview

Petitioner is a life-long leader in the community, recognized for his many achievements in the public and private sector, which continue to this day, as exemplified by his recent groundbreaking work in the treatment of comatose patients. He is also recognized for the character, integrity and honesty he has exhibited in his highly successful careers in medicine, government service and private enterprise. A graduate of Duke University School of Medicine, who received his housestaff training in neurosurgery at Stanford, he became the most decorated Army physician to serve in Vietnam, which included being awarded a Silver Star, a Bronze Star and the Air Medal for Valor, for acts of heroism in saving the lives of others while under fire. He served in the cabinet of then Governor Ronald Reagan, as Secretary of Health and Welfare for the State of California, afer being appointed to the post at age 30, the youngest age of anyone to hold that position. He held a joint appointment as an adjunct associate professor at the USC School of Medicine and Director of the Center for Health Sciences Research. In the private sector, he was and remains a leader in forging advances in medical treatment through technology. As one of the first people to recognize the concept of "information technology," and its potential to change our world, he is credited with responsibility for major innovations in information processing and delivery, including developing the

vertical blanking interval ("VBI") found in all television broadcast signals as a low cost means for simultaneous, real time data transmission.

As of 1989, Petitioner was Chairman and CEO of Infotechnology, ("Infotech"). Infotech owned majority or controlling interests in Financial News Network ("FNN"), United Press International ("UPI"), The Learning Channel ("TLC"), and other companies. Petitioner and the companies he controlled were leaders, and poised to become the dominant force, in the programming and distribution of full time financial news broadcasts for public and private subscribers, full time sports broadcasts for cable television, and leading content providers for other areas of programming that were just beginning to develop, such as educational programming.

Then, in June, 1990, auditors learned that Steve Bolen, the CFO of Infotech and FNN, had submitted false financial statements to Security Pacific National Bank ("SPNB"), in obtaining loans for FNN and Infotech. It was also discovered that at the same time, Bolen was negotiating with SPNB for a loan to build a home for himself in Bel Air. 7-9.

Petitioner and other members of the independent board of directors immediately suspended Bolen and, together with the companies' outside auditors, took steps to determine the scope of Bolen's misfeasance. Witnesses agreed that Petitioner changed from his usual broad, oversight role in the operation of the company and laissez faire management style, to taking charge of the day-to-day operation of the company in a detailed, "hands-on" manner in an effort to navigate the company through the problems Bolen had created.

The investigation did not reveal any reason to doubt Infotech's or FNN's projected future growth and earnings. It did, however, result in FNN announcing in October, 1990, that it was recording a $72 million loss for fiscal year 1989, to reflect adjustments made by its public auditors. In response to the announcement, FNN's publicly traded stock dropped below 5 1/4, which gave SPNB the right to default its loan, which it did. By the spring of 1991, FNN was placed in bankruptcy and its assets sold. The sale of assets made the creditors whole.[1]

B. The Five Year Investigation and Resulting Prosecution

An immediate and intensive SEC investigation ensued, during which numerous witnesses were subpoenaed to appear and testified under oath. No allegations of wrongdoing were made against the Petitioner, and the SEC investigation ended in the signing of a consent decree. Notwithstanding the SEC investigation and despite its outcome, prosecutors in the U.S. Attorney's Office in the Central District of California initiated a grand jury investigation.

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[1] This fact was acknowledged by the prosecution in its successful pretrial motion to exclude the absence of loss evidence -- "The fact that FNN and Infotech's lenders were fully repaid from FNN's Bankruptcy Estate is not a defense to bank fraud." CR: 89 ("Govt.'s Motion In Limine To Preclude Evidence of (1) The Absence of Loss to the Victim Banks, and (2) The Alleged Absence of Loss to the Victim Investors").

From the outset of their investigation, the prosecutors made it clear, by the deals they offered witnesses, that Petitioner was not just the focus of their investigation, but its object; grants of immunity and plea bargains were available only if the witness could provide testimony incriminating Petitioner. Even so, after years of investigation, the prosecutors had failed to turn up any witnesses who implicated Petitioner in Bolen's fraudulent scheme.

Then, with the five year statute of limitations rapidly approaching, the prosecution turned to Bolen to make their case. Even though Bolen's guilt was obvious and could be easily proven, the prosecutors gave him a way out -- if Bolen could incriminate Petitioner, the prosecutors would authorize Bolen's sentencing judge to grant a departure under section 5K1.1 of the Sentencing Guidelines. ER 34. The offer was one Bolen could not refuse. Accordingly, on July 14, 1995, Bolen signed a plea agreement in which he admitted and agreed to plead guilty to falsifying FNN's financial statements beginning in late 1988 through mid-1990. Bolen admitted he had falsified the financial statements by recording false income through the use of inter-company charges and sale-leaseback transactions, and then submitted the false financial statements to SPNB, in obtaining loans for FNN and Infotech. Bolen's plea agreement obligated him to testify for the prosecution, in return for the prosecution making a downward departure motion under § 5K1.1, U.S.S.G. ER 34.

Once the deal with Bolen was struck, the prosecutors returned to the witnesses who previously had been unable to provide any information incriminating Petitioner in Bolen's scheme. The prosecutors offered the witnesses the same benefits as before to incriminate Petitioner, but this time the

offer was accompanied with a threat -- criminal prosecution. Certain witnesses were told they could escape prosecution entirely if they had information to offer against the Petitioner, while others were told their indictment was assured and that a plea bargain was available only if they could incriminate Petitioner.

After securing deals in which they gained testimony for favorable treatment, the prosecutors obtained an indictment of Petitioner in September, 1995. The indictment alleged that beginning in 1988 and continuing to 1990, Bolen and Petitioner, together with others, had conspired to falsify FNN's income to show short-term profitability. The indictment further alleged that after Bolen was discovered in July, 1990, to have created the false financial statements, Petitioner attempted to justify the income by "back-filling" the leases.

Petitioner was tried before a jury on a 13 count indictment charging him with conspiracy (count one), false statement to an accountant of a publicly traded company and in a report filed with the SEC (counts 2-3) and bank fraud (counts 4-13). ER 1.

Trial began June 25, 1996, and the case was submitted to the jury on September 10, 1996. CR: 123, 195. After deliberating for six weeks, the jury returned a guilty verdict on counts 1-3, 6-9 and 11-13, but deadlocked on counts 4, 5 and 10, and a mistrial was declared as to those counts. CR: 221. Petitioner was sentenced on May 20, 1997 to 57 months in prison. App K-24.

C. The Direct Appeal

Petitioner was granted bail pending appeal by the court of appeals, as it found that his direct appeal presented a substantial issue likely to result in a reversal of his conviction, a new trial or a sentence that did not require imprisonment. App A-1. The parties were allowed to file oversized briefs of 17,000 words and were notified in August that the case was scheduled for 20 minutes of argument. App B-2. On September 29, 1998, one week before the scheduled argument, the court ordered the appeal be submitted on the briefs without argument. App C-3. Petitioner filed a letter requesting the court reconsider it order and allow argument, which was denied. App D-4.

A week after the appeal was submitted on the briefs, the panel issued an unpublished "memorandum disposition" affirming Petitioner's conviction and sentence. App E-5. The memorandum merely stated the claims raised by Petitioner, and said they were rejected, without analysis. *Id.*

Petitioner filed a petition for rehearing and a suggestion of rehearing en banc. One of the grounds stated as to why a rehearing should be granted was the panel's failure to provide a reasoned disposition. An amicus brief supporting the request for rehearing on this ground was filed by a group of law professors, and others. App F-8. On December 3, 1998, the panel ordered Respondent to file a response to the rehearing petition. App G-9.

On March 11,1999, the panel issued a new memorandum disposition, which, as requested by the rehearing petition, provided reasons for the panel's rulings

and supporting analysis. App I-17. The panel, however, issued the new memorandum not by granting the rehearing petition, but by issuing an order "amending" its previous memorandum, and denying the rehearing petition. App H-10. Had the panel acknowledged the new memorandum was issued in response to the rehearing petition, Petitioner would have had the right to file a petition for rehearing of the new memorandum, but because the panel issued the new memorandum pursuant to an order, Petitioner was unable to do so.

Petitioner submitted a request under the Ninth Circuit rules that the panel's new memorandum be published, on the ground that publication was required by the court's rules, given the content of the new memorandum. The panel denied the request for publication in an order issued May 24, 1999. App J-23.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case stands as an example of the *de jure* and *de facto* imbalance of power that has come to exist in the federal criminal process. Prosecutors have unrestrained ability to pursue indictment of a targeted individual without resource limitations for years on end, and to gain the evidence they seek by threatening indictment and bartering for testimony for helpful testimony. The prosecution enjoys similar one-sided advantages at trial, as to both procedure and substance. The transformation of the right to appeal into a discretionary review process contributes to the imbalance in power, as it undermines the error prevention and error correction functions of the appellate process.

Each of these separate areas identified below are independently deserving of review, as they present important issues that impact numerous cases. Collectively, the errors that occurred in this case, and their failure to be corrected on direct appeal, reveal and represent the imbalance in power that prosecutors have come to have, an imbalance that effectively denied the Petitioner in this case his due process right to a fair trial. Unless the federal courts explicitly recognize this imbalance in power, and take steps to curb it, the right to a fair trial will continue to erode. This Court should grant review to reaffirm the principle that the due process clause regulates the balance of power in the adversary system, and to establish that individual errors can render a trial so one-sided as to result in a violation of that principle, and require the defendant be given a new trial.

REASONS FOR GRANTING THE WRIT

I. The Prosecution's Reliance On Testimony Obtained Through Its One-Sided Ability To Give Witnesses Immunity And Other Things Of Value, And Its *De Facto* Ability To Control The Admission Of Evidence, Together With The Trial Court's Consistently One-Sided Erroneous Rulings Favoring The Prosecution, Upset The Balance Of Power Between Adversaries Required By Due Process, And Denied Petitioner His Right To A Fair Trial

1. The Prosecution Relied On Its One-Sided Ability To Reward Witnesses For Testimony For Its Evidence Of Petitioner's Guilt

Throughout the five year grand jury investigation, Petitioner was either exonerated or not implicated in any wrongdoing by the witnesses interviewed by prosecutors. Not willing to accept what they were told, prosecutors re-interviewed witnesses multiple times, making it clear that if they failed to implicate Petitioner, they faced indictment. Eventually, either by granting immunity or offering reduced sentences, the prosecution were told what they wanted to hear.

It is illegal to offer, promise or give a witness something of value for testimony. 18 U.S.C. § 201(c). Only prosecutors engage in such conduct without consequence. The leverage prosecutors have in employing this practice is made even more powerful by the Sentencing Guidelines.

Under § 5K1.1, U.S.S.G., the prosecution determines whether a judge will be authorized to grant a downward departure for cooperation.

Prosecutors had no tangible evidence of Petitioner's guilt. And without their ability to barter for testimony, prosecutors would have had no case at all. While this practice may not be illegal *per se*, it indisputably creates an imbalance in the adversary process. *See, Wardius v. Oregon*, 412 U.S. 470, 472 (1973) Together with the errors discussed below, the imbalance caused by the prosecution's ability to barter for testimony amounted to a denial of due process.

2. The Prosecution Withheld From Cross-Examination The One Witness It Said Had Direct Knowledge Of Petitioner's Guilt And Blocked The Admission Of The Witnesses' Plea And Cooperation Agreement

It was Steve Bolen's guilty plea and his agreement to provide information incriminating Petitioner that enabled prosecutors finally to get evidence to indict Petitioner. And, if the prosecution's allegations against Petitioner were true, Bolen was the one person who indisputably would have had direct proof of Petitioner's guilt. The actual extent and reliability of Bolen's information was only known by the prosecution, because while Bolen regularly met with them, he refused to be interviewed by the defense. ER 234-35.

The prosecution listed Bolen as a trial witness. In his opening statement, the prosecutor told the jury Bolen and Petitioner had together "cooked up" the scheme to show false

income. ER 127-28. Bolen, the prosecutor said, was Petitioner's "lieutenant." ER 294, 304.

Throughout the trial, the prosecution relied on Bolen to build its case against Petitioner. For example, the prosecution had its witnesses testify Bolen never told them not to tell Petitioner of his fraud. ER 189-91, 192, 193, 201, 203, 204, 205, 230-31, 287. The prosecution argued Bolen's silence was proof Petitioner knew of the fraud, because otherwise Bolen would have warned others not to tell him. Similarly, prosecutors introduced statements Bolen made when confronted with his wrongdoing, and argued the statements incriminated Petitioner. ER 195-99.

The prosecution, however, never called Bolen himself to the stand. Instead, the prosecution used Bolen to convict Petitioner, while shielding him from cross-examination. While the right of confrontation does not prohibit the admission of such co-conspirator statements, it does entitle a defendant to introduce evidence relevant to the alleged co-conspirator's bias and motive. Fed. R. Evid. 801(d)(2)(E).

Petitioner sought to do just that by introducing the written agreement between Bolen and the prosecution. The agreement would have revealed Bolen was being rewarded for his assistance to the prosecution. When the Petitioner sought to introduce the agreement, the court's first response was the correct one -- "I have no problem with 2352" (the cooperation agreement). ER 285. The prosecutor, however, immediately objected, arguing (incorrectly) that the agreement was not relevant as he had not called Bolen. The court changed its ruling and adopted the prosecutor's argument. ER 286 (RT 9/4: 96).

3. After Successfully Excluding Its Plea And Cooperation Agreement With The Witness, The Prosecution Falsely Argued The Witness Was Equally Available To The Defense

Petitioner wanted to introduce Bolen's plea agreement for another reason -- it would have shown Bolen was obligated to testify if requested to do so by the prosecution, and that given the cooperation provisions of the agreement, Bolen had substantial reason to be biased in favor of the prosecution were he called to testify. In sum, the agreement would have established Bolen was "peculiarly available" to the prosecution. *See*, *United States v. Hoenscheidt*, 7 F.3d 1528, 1531 (10th Cir. 1993)(witness may be peculiarly available to the other side "if the witness would be hostile or biased against the calling party."); *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988).

Proof that Bolen was peculiarly available to the prosecution was relevant because of an evidentiary inference this Court recognized and approved over a hundred years ago, and which federal courts have repeatedly endorsed and applied through the years:

> "When the government can call a key percipient witness, but relies instead on out-of-court statements and [other testimony], a jury could conclude that the witness's 'testimony, if produced, would [have been] unfavorable' to the prosecution."

United States v. Kojayan, 8 F.3d 1315, 1317, 1320 (9th Cir. 1993), *quoting, Graves v. United States*, 150 U.S. 118, 121, 14 S. Ct. 40, 41, 37 L. Ed. 1021 (1893). If, as is the case here, the witness the prosecution fails to call is the person who should be best able to prove its case if the charges have merit, the resulting unfavorable inference can constitute a "powerful defense." *Kojayan*, 8 F.3d at 1323-24. Petitioner was deprived of presenting that powerful defense, when the trial judge altered his initial ruling, and adopted the prosecutor's erroneous position to exclude the agreement.

The prosecutor, however, did not stop with blocking this powerful defense. In his rebuttal summation, the prosecutor told the jury Bolen was "equally available" to both sides, and the fact he was not called was thus evidence of Petitioner's guilt. That argument was false, the prosecutor knew it was false, and he committed misconduct in making it. The prosecutor's attempt to defend the statement on the ground that Bolen was subject to subpoena is contrary to law. *United States v. MMR Corp.*, 907 F.2d 489, 502 (5th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991) ("That the potential witness is physically present at trial or accessible to service of subpoena by the court does not make the witness equally available to both sides.") ; ; *see, Samish v. United States*, 223 F.2d 358, 365 (9th Cir. 1955)(defendant's argument that his secretary was "equally available to both sides is to ignore plain facts.")

4. The Prosecution Presented Loss Evidence To Establish A Motive, But Then Prevented Petitioner From Proving There Was No Loss, And That He Had No Motive

Prior to trial the court granted the government's motion precluding the defense from introducing testimony or other evidence to prove the absence of an actual loss. CR: 89, 96, 101, 134. In stating the reason for its ruling, the court adopted the government's argument: "[i]t is not relevant whether or not there is a loss with regard to the banks or the investors, it's not relevant to the charge." RT 6/14: 40; ER: 109.

Although loss is not an element of the offense, and thus "not relevant to the charge," the prosecution here made loss a material issue by relying on it to establish motive. Evidence disputing the prosecution's claimed motive, and showing the absence of actual loss, was therefore relevant and admissible under F.R. Evid. 401 and 402. The court's ruling was error, under the applicable abuse of discretion standard of relevance. *United States v. Thomas*, 32 F.3d 418, 420-21 (9th Cir. 1994).

5. The Prosecution Used Improper Leading Questions As Evidence Of The Otherwise Unproved Essential Element Of Guilty Knowledge

As noted above, the prosecution admitted that it sought to prove Petitioner's guilty knowledge by relying on the fact Bolen had not told others to keep his fraud secret from Petitioner. To overcome the obvious weakness in that

method of proof, the prosecutor turned to leading questions to prove the essential element of guilty knowledge. Unable to have his witnesses state the required facts, the prosecutor stated them for the witness: "Earl Brian knew that the financial statements were bogus; is that correct?" "That's correct." RT 7/1: 218; ER: 494. "Mr. Manasco, are you happy with the circumstances that have led you to be sitting in the witness stand after having to ask for immunity from the government for conduct that Earl Brian directed you to do?" "Objection." "Overruled." ER: 484-486.

6. The Prosecutor Used The Changed Version Of Facts Manasco Gave After The Prosecution Granted Him Immunity, And Then Blocked Petitioner From Introducing Manasco's Earlier Taped Statements That Contradicted His Trial Testimony And Exonerated Petitioner

When the defense sought to impeach immunized witness Keith Manasco with a tape of a meeting he had with Petitioner that was recorded by the F.B.I. while Manasco was working in an undercover capacity in June, 1991 (Exh.1901; ER: 44), the court sustained the government's objection to use of the tape on grounds that Petitioner's statements on the tapes were hearsay. CR: 142, 144, 146; RT 7/15: 145-148; ER: 176-179. This ruling had no basis because Petitioner's statements would be hearsay only if offered for the truth (Fed. R. Evid 801(c)), and the defense sought to use the tape was to impeach Manasco. (CR: 142) Fed. R. Evid 801(c). The ruling was extremely prejudicial because the impeaching nature of the tape would have made it apparent that what Manasco first told the government before he received

immunity was true (that prosecution witness Prince told him to purchase the equipment and he did not talk to Petitioner about it because he considered him inaccessible), and that what he said to get immunity was not.

7. The Prosecutor Kept Petitioner's Expert Witness Off The Stand Until After The Defense Had Rested

As part of his defense, Petitioner sought to present an expert witness from the accounting firm of Arthur Anderson to establish and explain the valuation of Infotech and FNN, and why there would have been no reason for Petitioner to falsify income to obtain bank financing. The defense sought to present the expert prior to Petitioner's own testimony, because it provided an important foundation for Petitioner's testimony, and objective support for critical facts to be addressed in his testimony. When Petitioner offered the witness, the prosecution objected and the court ruled the expert's testimony was inadmissible.

After Petitioner's defense had rested, the prosecution told the court it was concerned the earlier ruling might be reversible error. For that reason, the prosecution said it was withdrawing its previous objection to the admission of the testimony, and requested the court rule that it was admissible. Petitioner asked for a mistrial, explaining that the prejudice caused by the earlier exclusion of the evidence could not be cured by allowing the defense to reopen and present the testimony. The court denied the mistrial, and ruled the testimony was admissible. RT 9/3: 110-118. The court did not explain what it was that transformed inadmissible evidence into admissible evidence, other than the

prosecution's tactical interest in preventing Petitioner from obtaining appellate relief for the prejudice he had already suffered.

8. The Court Made Numerous Other Biased, Erroneous Rulings In Deference To The Prosecutors, Such As Refusing The Jury's Request To Read Back Several Pages Of Testimony In Which A Key Prosecution Witness Perjured Himself

(a) When prosecution witness Prince was impeached on cross-examination with a transcript of his guilty plea, his immediate and seemingly instinctive response to being caught in a lie was as telling as it was surprising -- he denied he had lied and placed the blame on the court reporter, who was the same reporter present at the trial. RT 7/3: 116-118; ER: 170-172; RT 7/1: 164-165; ER: 165-166. When the jury requested this portion of Prince's testimony be read back on the fourth day of deliberations (and more than two months after the testimony), the court denied the request without first advising or consulting counsel. ER: 74; RT 9/16: 4; ER: 447. The entire testimony requested was less than five pages. RT: 7/1: 164-165; RT 7/3: 116-118: ER: 165-166, 170-172. The court said it primary reason for denying the request was "it's more important that his testimony was clearly embellished in my mind when I heard it; and then it was, you know, referred to enough by all of the attorneys that I think the jurors can certainly rely on the testimony as they heard it." RT 9/16: 7; ER: 450. This reason is not only insufficient justification to deny the request, it is actually a reason why the request should have been granted and the court appeared to be protecting Prince from "embellishment," which jurors reasonably may

viewed differently. *United States v. Castillo*, 866 F.2d 1071 (9th Cir. 1988); *United States v. Zarintash*, 736 F.2d 66 (3d Cir. 1984).

(b) the government cross-examined Petitioner to suggest he had a motive to hide income, which was to avoid taxes. Petitioner offered that he had a carry-forward loss that would have covered any taxes. When the defense procured testimony from Petitioner's bookkeeper to corroborate that he had a carry-forward loss, the court sustained the prosecutor's relevance objection. The court said it realized the testimony was relevant, but said it was excluded because it was corroboration of testimony by Petitioner. RT 8/13: 71, 96-97; ER: 690-691. There is no basis for such a ruling. *See*, *United States v. Edwardo-Franco*, 885 F.2d at 1008 (reversing conviction due to number of incorrect adverse rulings against the defense, which legitimately gave rise to an inference of bias, and noting "the AUSA successfully objected on the unique ground that counsel was 'using this witness to confirm the defendant's story.' This argument should have been rejected.");

(c) Although the prosecution made much of the fact that certain bank accounts were "offshore" and implied that this status alone rendered them at least suspect, the court prohibited defense counsel from establishing the legitimate use of offshore accounts by other companies. RT 8/14: 82; ER: 694;

(d) The government was allowed to establish through FNN's president Michael Wheeler that Petitioner "supervised" Bolen, but the court would not allow the defense

to elicit from Wheeler what he meant by "supervision." RT 8/15: 51; ER: 701.

As these examples illustrate, with an unmistakable degree of frequency, the court's incorrect and biased rulings would follow the lead of the prosecution.

II. Increasing The Length Of A Defendant's Prison Term For A Loss Incurred By A Victim After The Victim Has Been Made Whole By The Defendant Violates Due Process, As Does Increasing A Defendant's Prison Term By Treating The Amount Paid To Shareholders As A Loss

Under § 2F1.1 of the Sentencing Guidelines, Petitioner's "base offense" was six. If there was a loss that exceeded $2,000, additional levels (up to 18) were to be added according to the amount of the loss. U.S.S.G. § 2F1.1(b)(1). There were two potential loss amounts here: the loss to the lenders, and the loss to shareholders.

1. After A Lender Is Made Whole By Gaining Control And Ownership Of Collateral, Its Subsequent Mishandling Of The Collateral Is Not Grounds For Keeping The Defendant In Prison

Both sides agreed that the applicable measure of loss for the bank fraud offenses is the "actual loss." Both sides also agreed that the "actual loss" is determined by taking "the amount of the loan not repaid . . . reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." U.S.S.G. § 2F1.1

(n.7(b)).

The dispute was whether in calculating the "actual loss" amount, the offset for the "amount recovered," as that term is used in note 7 to § 2F1.1, refers to the "amount recovered" at the time pledged collateral is transferred to the victim, or at the time the victim disposes of it. The answer to that question is worth five years of Petitioner's freedom.

If the amount recovered is the value at the time of transfer, the "actual loss" amount was zero, because at the time SPNB gained control and ownership of the collateral, its fair market value completely offset SPNB's claim. The loss SPNB subsequently claimed at Petitioner's sentencing occurred after it had been made whole, and was caused by SPNB's unexplained decision to dispose of the collateral at such a low price that the district court considered it to amount to "mishandling," and denied SPNB's request for restitution for that loss.[2] This was correct, because in determining "actual loss" for purposes of restitution, the offset for collateral is based on the value of the "collateral property as of the date title to the property was transferred."[3]

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[2] "Lender's handling of collateral" was the court's reason for ordering no restitution. ER 107; ER 477 (RT 5/20/97: 13).

[3] *United States v. Catherine*, 55 F.3d 1462, 1465 (9th Cir. 1995); *quoting, United States v. Hutchinson*, 22 F.3d 846, 854-56 (9th Cir. 1993), *quoting, United States v. Smith*, 944 F.2d 618, 625-26 (9th Cir. 1991), *cert. denied,* 503 U.S. 951 (1992).

While excluding SPNB's self-caused loss of $15 million for purposes of restitution, however, the court treated it as a loss under § 2F1.1 of the Guidelines. Thus, Petitioner's offense level, and the length of his prison sentence, were increased based on the $15 million amount. This is error of constitutional magnitude.

In arriving at a victim's "actual loss," whether for purposes of determining restitution or prison time, the offset for collateral must be based on its value at the time of transfer. The reason is because "[a]s of that date, the new owner had the power to dispose of the property and receive compensation . . . Any reduction in value after [the defendant] lost title to the property stems from a decision by the new owner to hold on to the property . . ." *Id.* In both circumstances, restitution and § 2F1.1 of the Guidelines, "actual loss" means the same thing -- the victim's injury. Moreover, it is consistent the need for finding causation in making a loss determination.[4]

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[4] *See, e.g.*, *United States v. Daddona*, 34 F.3d 163, 170 (3rd Cir. 1994) (remanding for resentencing because the record had no indication that the loss figure used by the court "was due to the fraud of the appellants), *cert. denied*, 115 S. Ct. 515 (1994); *United States v. Marlatt*, 24 F.3d 105, 107 (7th Cir. 1994) (applying proximate cause analysis to assess the court's determination of loss); *United States v. Harper*, 32 F.3d 1387, 1391 (9th Cir. 1994) ("what we do insist upon, however, is use of a realistic economic approach to determining what loss has he truly caused or intended to cause. . ."), *cert. denied*, 115 S. Ct. 1162 (1995).

2. The Amount Paid To the Shareholders Is Not A Loss

The district judge was presented with three different amounts, based on three different measures or definitions of shareholder loss. The government took the trading price of the stock on two arbitrary dates (440 days apart), and multiplied the difference by the number of outstanding shares and called the result the "aggregate decline in market value," which it asserted was the "shareholder loss." The Probation Office, rejecting the government's approach, used the amount paid out to settle the shareholders' class action law suit. The defense employed a nationally recognized expert who analyzed the daily trading and price changes in the stock for the relevant period as determined in shareholders' civil suit, to arrive at the actual out-of-pocket losses and gains to the shareholders who traded in the stock during that period of time.[5]

Faced with these three very divergent methods and amounts, and no relevant Guideline provision, the court adopted the amount proposed by the Probation Office. The court stated its reason for doing so as follows:

> I don't know that both sides are so incorrect in arguing that the settlement amount as

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[5] The expert explained his method and its application in a detailed declaration which was supported by relevant documentation. That method is summarized in the Defendant's Reply Brief at pages 46-47.

> pointed out by the probation officer is so erroneous that the court cannot accept it.
> I do accept it. [RT 5/20/97: 7-8]

This amount cannot be the best measure of shareholder loss, because value transferred to the shareholders in settlement is a gain, not a loss. As reflected by the Sixth Circuit's decision *United States v. Wright*, 60 F.3d 240, 241-2 (6th Cir. 1995), this amount cannot be used as the loss amount, because under the Guidelines, recovery received later to offset losses from the offense are not included in the loss amount at sentencing.

The answer to the question of which of the three methods is the best and most appropriate measure of shareholder loss is provided by considering how the resulting figure is used to determine the offense level and punishment. The "shareholder loss" amount is placed on the "fraud table" of § 2F1.1 and the resulting offense level determines punishment. The dollar amounts and corresponding offense levels on fraud table apportion punishment based on the assumption that the amounts are the out-of-pocket "actual loss" or "intended loss" to the victim or victims.

Of the three methods, only the one employed by the defense expert measures the actual out-of-pocket losses to the victims of the "fraud on the market." Even if the government method accurately determined the "aggregate market decline" (and it does not), it could not be used to determine appropriate punishment under the fraud table because it does not even purport to represent out-of-pocket losses. If a large shareholder held the stock as it rose and then returned to the

price at which it was purchased, he or she would not have suffered any loss. But yet the government's method could result in severe punishment by taking the dates the stock was at its highest and lowest prices, multiplying the difference times the number of shares owned by the large shareholder, and calling the result "shareholder loss."

Given the fraud table is used to determine punishment for shareholder loss, and given that the defendant's measure of shareholder loss is the only one that measures what the fraud table punishes, it is the method the court should have used. The court's use of a settlement amount paid to shareholders as a loss amount to determine prison time, not only lacks any support in the Guidelines, but it is so irrational as to violate due process.

III. Petitioner Was Denied His Right To A Meaningful Direct Appeal By The Court Of Appeals Refusal To Hear Argument, Its Non-Reasoned Memorandum Disposition That Failed To Address The Serious And Substantial Issues Raised By Petitioner, The Court's Issuance Of A New Memorandum That Was Not Subject To A Rehearing Petition, And By The Court's Refusal To Follow Its Rules Governing Publication

By statute, a federal defendant has a right to an appeal. *See*, 18 U.S.C. § 3732; Fed. R. App. P. 3 & 4. This Court has recognized that given there is a right to appeal, certain corollary principles follow, such as the right to a transcript and the right to the appointment of counsel for indigent defendants. *See, Douglas v. California*, 372 U.S. 353, 355-57 (1963). Likewise, the resulting right to counsel on appeal,

entitles one to more than just the right to have an attorney appointed, as it necessarily includes the right to competent representation by an attorney. That is, the right in substance as well as form.

This Court has not decided whether that same principle applies to the right to appeal itself. That is, does the right to appeal entitle one to a meaningful review, so that the right is guaranteed in substance and not just in form. The answer to that question is surely yes, and unless this Court proclaims it to be true, the developing trend for it to become *de facto* a right in form only, and not one of substance, will continue to grow, as will the disillusionment and disrespect that result when a right of substance becomes one of form only.

This case is especially suitable for review by this Court for that purpose. The reason for that is several-fold.

First, it is beyond dispute that this case was deserving of, indeed, in need of, meaningful review on appeal. Petitioner, at age 60, after having proved himself to be a person of character and integrity for decades, in circumstances far more demanding than most ever encounter, is being sent to prison for five years for a crime that was proved solely by bartered for testimony from people who have proven themselves to be untrustworthy.

Second, it cannot plausibly be disputed that the issues presented by Petitioner's direct appeal were substantial and serious. They included questions of first impression pertaining to the constitutionality of using an SEC regulation as a basis for criminal liability, evidentiary and procedural

rights issues that effected the reliability of the verdict, and unanswered sentencing guideline questions that impact not just Petitioner but thousands of other defendants.

Third, although ordinarily it might be difficult to know that an appeal has not received meaningful consideration, the memorandum disposition issued by the panel in this case made it easy. The denial of meaningful review here is established not by the panel's cancellation of argument a week before it was scheduled, or by the issuance of a two and a half page memorandum a week later, but by the content of the memorandum itself. For example, the memorandum says "the prosecutor's statement that [the uncalled witness] was 'equally available' to both sides was not false" "[b]ecause [the witness] was in fact available to both the prosecution and the defense . . ." App E-6. That statement could not be a reason for the decision it purports to support, because a witness who is available to both sides is not thereby rendered "equally available." Indeed, it is not necessary to take a position on the merits of this issue in order to recognize that this is the type of error in logic that can only be explained as the result of the absence of meaningful consideration, in which form is used to give the appearance that substance has been considered.

Similarly, the memorandum applied a clear error standard of review to the sentencing claims, because that is the standard applicable to claimed errors in "calculating the amount of the loss . . ." App E-7. It was plainly evident from Petitioner's brief, however, that the sentencing issues concerned the definition of loss, to which a *de novo* standard of review applies. Again, this is a serious error that is inconsistent with, and proves the absence of, meaningful

consideration.

The absence of meaningful review here was sufficiently apparent, and egregious, as to have lead a group of law professors to file an amicus brief urging the court to rehear the appeal, and issue a reasoned disposition. Notably, the rehearing petition had an impact. The panel issued a new memorandum in which it did give reasons for its previous rulings, thereby implicitly recognizing the deficiencies in form and substance reflected by its initial memorandum.

Even though the panel issued its new memorandum in response to the rehearing petition, it denied the rehearing petition. And in the same order denying the petition, the panel "amended" its initial memorandum, in substantive content. Because the panel issued its new memorandum pursuant to an order "amending" its initial memorandum, rather than by granting the rehearing petition, the new memorandum was not subject to a rehearing petition. Had the panel acknowledged it was issuing the new memorandum in response to the rehearing petition, by granting the rehearing petition and issuing the new memorandum, it would have been subject to a renewed rehearing petition. At bottom, Petitioner was denied the right to a file a rehearing petition of the only memorandum in which the panel gave reasons for its earlier rulings. Thus, the amended memorandum, like the rest of the appeal process, used form to provide the appearance of having provided substance.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the questions presented in this petition.

Respectfully submitted,

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EARL W. BRIAN

* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	Central California
	)	
EARL W. BRIAN,	)	**ORDER**
	)	
Defendant-Appellant.	)	
	)	

Filed September 16, 1997

Appellant's emergency motion for stay of the September 22, 1997 surrender date is denied as unnecessary. Because appellant was on "bail at the time the motion [was] filed in this court, that bail [remains] in effect until the Court rules on the motion." 9th Cir. R. 9-1.2(d).

For the Court

Francisco X. Marquez
Motions Attorney/
Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	Central California
	)	
EARL W. BRIAN,	)	**ORDER**
	)	
Defendant-Appellant.	)	
	)	

Filed March 3, 1998

Before: Peter L. Shaw, Appellate Commissioner

Appellant's motion for leave to file a late, overlength brief is granted.

Appellee's brief is now due April 1, 1998. Appellee is sua sponte granted leave to file a brief not to exceed the length granted to appellant. The optional reply brief is due 14 days after service of the answering brief.

Court records do not currently reflect that the district court has issued the certificate of record. Appellant shall monitor the issuance of the certificate; absence of the certificate will block resolution of the appeal.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	Central California
	)	
EARL W. BRIAN,	)	**ORDER**
	)	
Defendant-Appellant.	)	
	)	

Filed September 29, 1998

The court is of the unanimous opinion that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Therefore, this matter will be ordered submitted without oral argument on Wednesday, October 7, 1998, in Pasadena, California. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

FOR THE COURT
CATHY A. CATTERSON
CLERK OF COURT

BY GWEN BAPTISTE,
DEPUTY CLERK

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	Central California
	)	
EARL W. BRIAN,	)	**ORDER**
	)	
Defendant-Appellant.	)	
	)	

Filed October 5, 1998

Before: PREGERSON, D.W. NELSON and THOMAS, Circuit Judges

This case shall stand submitted on the briefs Wednesday, October 7, 1998.

APPENDIX E

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	Central California
	)	
EARL W. BRIAN,	)	**MEMORANDUM***
	)	
Defendant-Appellant.	)	
	)	

Filed October 14, 1998

Appeal from the United States Court
for the Central District of California
Ronald S.W. Lew, District Judge Presiding

Submitted October 7, 1998**
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Before: PREGERSON, D.W. NELSON and THOMAS, Circuit Judges

Earl W. Brian appeals his conviction and 57-month sentence for conspiring to commit securities and bank fraud and conspiring to lie to the auditors of a publicly traded company in violation of 15 U.S.C. § 78ff and 17 C.F.R. § 240.13b2-2; and bank fraud in violation of 18 U.S.C. § 1344.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court.

First, the district court did not err by excluding Steven Bolen's plea agreement and refusal to be interviewed by the defense. Because Bolen was available to both the prosecution and the defense, the district court did not err by excluding these items of evidence on grounds of relevance.

Second, the prosecutor's rebuttal argument with respect to Bolen's availability did not constitute prosecutorial misconduct. Because Bolen was in fact available to both the prosecution and the defense, the prosecutor's statement that Bolen was "equally available" to both sides was not false. Cf. United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993).

Third, the district court did not err by excluding "absence of loss" evidence. The district court properly admitted evidence establishing Financial News Network's (FNN) value prior to and at the time of Brian's alleged misrepresentations because it was relevant to the issue of Brian's intent. The district court did not err, however, by excluding evidence of FNN's value after the alleged false statements had been made because this evidence was not

relevant.

Fourth, there was no judicial bias depriving Brian of a fair trial. The record makes clear that the district judge was not biased in his rulings concerning the examination of witnesses, the use of documents, or various evidentiary limitations. Moreover, none of the judge's comments to defense counsel and defense witnesses amounted to misconduct.

Fifth, counts Two and Three of the superseding indictment, charging Brian with violating 17 C.F.R. § 240.13b2-2, are not legally or factually insufficient. Counts Two and Three properly charge Brian with making misrepresenations to FNN's auditor in connection with a statutorily required audit for fiscal year 1990.

Finally, the district court did not commit clear error in calculating the amount of loss for sentencing purposes. The district court properly rejected Brian's argument that Security Pacific National Bank caused its loss rather than Brian. Additionally, the court reasonably estimated the amount of shareholder loss.

AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	Central California
	)	
EARL W. BRIAN,	)	**ORDER**
	)	
Defendant-Appellant.	)	
	)	

Filed December 3, 1998

Before: D.W. NELSON, Circuit Judge

The motion for permission to file a joint amicus brief, filed November 25, 1998, is hereby granted.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	Central California
	)	
EARL W. BRIAN,	)	**ORDER**
	)	
Defendant-Appellant.	)	
	)	

Filed December 3, 1998

Before: D.W. NELSON, Circuit Judge.

Plaintiff-Appellee is directed to file a response to the petition for rehearing and suggestion for rehearing en banc within 14 days from the filing date of this order.

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	
	)	**ORDER**
EARL W. BRIAN,	)	**AMENDING**
	)	**MEMORANDUM**
Defendant-Appellant.	)	**AND DENYING**
	)	**REHEARING**

Filed March 11, 1999

Before: PREGERSON, D.W. NELSON and THOMAS, Circuit Judges

The memorandum filed October 14, 1998, is amended as follows:

p. 1, lines 8-9 — A sentence has been added: "The parties are familiar with the facts, and we discuss them only as necessary to aid our analysis."

p. 2, lines 1-7 — A paragraph has been added: "A district court's evidentiary rulings

during trial are reviewed for an abuse of discretion. See United States v. Gallager, 99 F.3d 329, 331 (9th Cir. 1996), cert. denied, 117 S.Ct. 1274 (1997). A district court has broad discretion in supervising trials, and its behavior during trial justifies reversal only if it abuses that discretion. See United States v. Nash, 115 F.3d 1431, 1440 (9th Cir. 1997)."

p. 2, lines 10-27 A sentence has been removed: "Because Bolen was available to both the prosecution and the defense, the district court did not err by excluding these items of evidence on grounds of relevance." It was replaced by: "The record makes clear that the government did not have the "exclusive means and ability" to call Bolen to the stand. As the district court pointed out, Brian could have, and did not, subpoena Bolen. Brian contends that Bolen could have asserted his Fifth Amendment privilege in response to a subpoena. The government is correct to argue that there is no reason for Brian to "presume" that Bolen would have asserted the privilege. After all, unlike the defendants in the cases cited by Brian, United States v. Glenn, 64 F.3d 706, 710 (D.C. Cir. 1995), and United States v. Pitts, 918 F.2d 197,

200 (D.C. Cir. 1990), Bolen has already incriminated himself by signing the government's plea agreement. Moreover, the government informed defense counsel in writing before the close of the defendant's case that it would produce Bolen at the defense's request. In sum, because the government, with what Brian calls the "peculiar power to have Bolen testify," guaranteed Bolen's availability, there was no reason for the district court to introduce documents that supposedly were necessary to prove Bolen's unavailability."

p. 3, lines 1-8

A paragraph has been removed: "Second, the prosecutor's rebuttal argument with respect to Bolen's availability did not constitute prosecutorial misconduct. Because Bolen was in fact available to both the prosecution and the defense, the prosecutor's statement that Bolen was "equally available" to both sides was not false. Cf. United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993). It was replaced by: "Second, Brian maintains that the prosecutor's rebuttal statement that Bolen was "equally available" to the defense was false and constituted misconduct. We disagree. As explained above, Bolen

was in fact "equally available" to both sides. Bolen promised the government that he would testify at its will, and the government promised Brian's counsel that it would produce Bolen at his request. The record gives no indication that the government's word should be called into question here."

p. 4-6, lines 16-end

A paragraph was removed: "Finally, the district court did not commit clear error in calculating the amount of loss for sentencing purposes. The district court properly rejected Brian's argument that Security Pacific National Bank caused its loss rather than Brian. Additionally, the court reasonably estimated the amount of shareholder loss." It was replaced with: "Finally, the district court did not err in calculating the amount of loss for sentencing purposes. Relying on cases from other circuits, Brian argues that the district court "failed to apply required principles of causation." Ninth Circuit law, however, imposes no such requirement. First, Brian concedes that the Sentencing Guidelines contain no explicit standard of causation in the definition of loss. Second, in United States v. Sarno, 73 F.3d 1470 (9th Cir. 1995),

we held that "[a]ny portion of the total loss sustained by the victim as a consequence of factors extraneous to the defendant's criminal conduct is not deducted from total 'victim loss' prior to the determination of the applicable guideline sentencing range." Id. at 1500-1501. After exposing Security Pacific National Bank (SPNB) to substantial risks by his criminal acts, Brian seeks to hold SPNB responsible for its own losses because of its subsequent, allegedly imprudent business decisions. Sarno, however, precluded the district court from discounting the loss amount for SPNB's purported poor judgment. Brian's attempt to distinguish Sarno is unavailing. His argument that the Guidelines treat collateral differently so that Sarno does not apply to the mishandling of collateral is unsupported by any legal authority.

The principle of the Guidelines, which is embodied in Sarno, is that the loss amount should reflect the seriousness of the defendant's crimes. Taking factors beyond the defendant's control into account to reduce the loss amount would result in an inaccurate assessment of his or her culpability. Therefore, Brian cannot evade

responsibility by claiming that SPNB acted unwisely.

Brian next takes issue with the district court's adoption of the amount of shareholder loss in the presentence report (PSR). The determination of the amount of shareholder loss is a factual finding, which we review only for clear error. See United States v. Ortland, 109 F.3d 539, 548 (9th Cir.), cert. denied, 118 S.Ct. 141 (1997). The Guidelines do not explain with precision how shareholder loss in a case such as this should be calculated. Brian presented a paid expert who argued that Brian's fraud caused no loss to shareholders. The PSR rejected Brian's position and also rejected the government's position, which appeared to overstate shareholder loss.

Instead, the PSR relied on a shareholder lawsuit brought against FNN after disclosure of Brian's fraudulent scheme, which resulted in a settlement. The record reveals that the calculation of shareholder loss was fraught with difficulty, and that there was little guidance from the applicable authorities. However, all that the Guidelines require is "a reasonable

> estimate of the loss." U.S.S.G. § 2F1.1, app. note 8. We cannot say that the district court's adoption of the PSR's compromise position was unreasonable or clear error."

With these amendments the panel has unanimously voted to deny the petition for rehearing. Judges Pregerson and Thomas voted to reject the suggestion for rehearing en banc. Judge D.W. Nelson recommended rejecting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX I

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EARL W. BRIAN, Defendant-Appellant.	**No. 97-50285** DC # CR-95-783-RSWL **AMENDED MEMORANDUM***

Filed March 11, 1999

Appeal from the United States Court
for the Central District of California
Ronald S.W. Lew, District Judge Presiding

Submitted October 7, 1998**
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Before: PREGERSON, D.W. NELSON and THOMAS, Circuit Judges

Earl W. Brian appeals his conviction and 57-month sentence for conspiring to commit securities and bank fraud and conspiring to lie to the auditors of a publicly traded company in violation of 15 U.S.C. § 78ff and 17 C.F.R. § 240.13b2-2; and bank fraud in violation of 18 U.S.C. § 1344.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court. The parties are familiar with the facts, and we discuss them only as necessary to aid our analysis.

A district court's evidentiary rulings during trial are reviewed for an abuse of discretion. See United States v. Gallager, 99 F.3d 329, 331 (9th Cir. 1996), cert. denied, 117 S.Ct. 1274 (1997). A district court has broad discretion in supervising trials, and its behavior during trial justifies reversal only if it abuses that discretion. See United States v. Nash, 115 F.3d 1431, 1440 (9th Cir. 1997).

First, the district court did not err by excluding Steven Bolen's plea agreement and refusal to be interviewed by the defense. The record makes clear that the government did not have the "exclusive means and ability" to call Bolen to the stand. As the district court pointed out, Brian could have, and did not, subpoena Bolen. Brian contends that Bolen could have asserted his Fifth Amendment privilege in response to a subpoena. The government is correct to argue that there is no reason for Brian to "presume" that Bolen would have asserted the privilege. After all, unlike the defendants in the cases cited by Brian, United States v. Glenn, 64 F.3d 706, 710

(D.C. Cir. 1995), and United States v. Pitts, 918 F.2d 197, 200 (D.C. Cir. 1990), Bolen has already incriminated himself by signing the government's plea agreement. Moreover, the government informed defense counsel in writing before the close of the defendant's case that it would produce Bolen at the defense's request. In sum, because the government, with what Brian calls the "peculiar power to have Bolen testify," guaranteed Bolen's availability, there was no reason for the district court to introduce documents that supposedly were necessary to prove Bolen's unavailability.

Second, Brian maintains that the prosecutor's rebuttal statement that Bolen was "equally available" to the defense was false and constituted misconduct. We disagree. As explained above, Bolen was in fact "equally available" to both sides. Bolen promised the government that he would testify at its will, and the government promised Brian's counsel that it would produce Bolen at his request. The record gives no indication that the government's word should be called into question here.

Brian mistakenly relies on United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993), in support of his position. In Kojayan, unlike in the case at bar, the prosecutor blatantly lied in his arguments to the jury. The government told the jury that it was unable to produce an important witness in the case, strongly suggesting that the reason was that the witness had asserted his Fifth Amendment right against self-incrimination. See id. at 1317. In truth, the witness had entered into a cooperation agreement with the government in which he had promised to "truthfully testify . . . at any trial or other court proceeding" at the government's request. Id. at 1318. Whereas in Kojayan, the prosecutor lied to the jury by

stating that an available witness was unavailable, here the prosecutor told the truth by informing the jury that Bolen was available to both the prosecution and the defense.

Third, the district court did not err by excluding "absence of loss" evidence. The district court properly admitted evidence establishing Financial News Network's (FNN) value prior to and at the time of Brian's alleged misrepresentations because it was relevant to the issue of Brian's intent. The district court did not err, however, by excluding evidence of FNN's value after the alleged false statements had been made because this evidence was not relevant.

Fourth, there was no judicial bias depriving Brian of a fair trial. The record makes clear that the district judge was not biased in his rulings concerning the examination of witnesses, the use of documents, or various evidentiary limitations. Moreover, none of the judge's comments to defense counsel and defense witnesses amounted to misconduct.

Fifth, counts Two and Three of the superseding indictment, charging Brian with violating 17 C.F.R. § 240.13b2-2, are not legally or factually insufficient. Counts Two and Three properly charge Brian with making misrepresentations to FNN's auditor in connection with a statutorily required audit for fiscal year 1990.

Finally, the district court did not err in calculating the amount of loss for sentencing purposes. Relying on cases from other circuits, Brian argues that the district court "failed to apply required principles of causation." Ninth Circuit law,

however, imposes no such requirement. First, Brian concedes that the Sentencing Guidelines contain no explicit standard of causation in the definition of loss. Second, in United States v. Sarno, 73 F.3d 1470 (9th Cir. 1995), we held that "[a]ny portion of the total loss sustained by the victim as a consequence of factors extraneous to the defendant's criminal conduct is not deducted from total 'victim loss' prior to the determination of the applicable guideline sentencing range." Id. at 1500-1501. After exposing Security Pacific National Bank (SPNB) to substantial risks by his criminal acts, Brian seeks to hold SPNB responsible for its own losses because of its subsequent, allegedly imprudent business decisions. Sarno, however, precluded the district court from discounting the loss amount for SPNB's purported poor judgment. Brian's attempt to distinguish Sarno is unavailing. His argument that the Guidelines treat collateral differently so that Sarno does not apply to the mishandling of collateral is unsupported by any legal authority.

The principle of the Guidelines, which is embodied in Sarno, is that the loss amount should reflect the seriousness of the defendant's crimes. Taking factors beyond the defendant's control into account to reduce the loss amount would result in an inaccurate assessment of his or her culpability. Therefore, Brian cannot evade responsibility by claiming that SPNB acted unwisely.

Brian next takes issue with the district court's adoption of the amount of shareholder loss in the presentence report (PSR). The determination of the amount of shareholder loss is a factual finding, which we review only for clear error. See United States v. Ortland, 109 F.3d 539, 548 (9th Cir.), cert. denied, 118 S.Ct. 141 (1997). The Guidelines

do not explain with precision how shareholder loss in a case such as this should be calculated. Brian presented a paid expert who argued that Brian's fraud caused no loss to shareholders. The PSR rejected Brian's position and also rejected the government's position, which appeared to overstate shareholder loss.

Instead, the PSR relied on a shareholder lawsuit brought against FNN after disclosure of Brian's fraudulent scheme, which resulted in a settlement. The record reveals that the calculation of shareholder loss was fraught with difficulty, and that there was little guidance from the applicable authorities. However, all that the Guidelines require is "a reasonable estimate of the loss." U.S.S.G. § 2F1.1, app. note 8. We cannot say that the district court's adoption of the PSR's compromise position was unreasonable or clear error.

AFFIRMED.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-50285**
	)	
Plaintiff-Appellee,	)	DC #
	)	CR-95-783-RSWL
v.	)	
	)	
EARL W. BRIAN,	)	**ORDER**
	)	
Defendant-Appellant.	)	
	)	

Filed May 24, 1999

Before: PREGERSON, D.W. NELSON and THOMAS, Circuit Judges

Defendant-Appellant's request for publication is hereby DENIED.

APPENDIX K

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

JUDGMENT AND

PROBATION/COMMITMENT ORDER

Docket No. CR - 95-783(A)-RSWL

UNITED STATES OF AMERICA, vs.
Defendant's Name Earl W. Brian

& Residence 5833 Deepwater Drive

Address Oxford, Maryland 21654

Mailing Address SAME

Social Security No. 237-66-1030

In the presence of the attorney for the government, the defendant appeared in person on this case:

Month	Day	Year
5	20	97

COUNSEL

☐ WITHOUT COUNSEL However, the Court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Richard Marmaro, Retained

PLEA

☐ GUILTY, and the Court being satisfied that there is a factual basis for the plea.

☐ NOLO CONTENDERE

☐ NOT GUILTY

FINDING

There being a finding/verdict of ☒ GUILTY, defendant has been convicted as charged of the offense(s) of:

conspiracy in violation of 18 USC 371, as charged in Count 1 of the 1st Superseding Indictment; false statements to accountants of a publicly-traded company in violation of 15 USC 78ff, 17 CFR

240.13b2-2 and 18USC 2, as charged in Counts 2 and 3 of the 1st Superseding Indictment; and bank fraud in violation of 18 USC 1344, as charged in Counts 6, 7, 8, 9, 11, 12 and 13 of the 1st Superseding Indictment.

JUDGMENT AND PROB./ COMMITMENT ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that, Pursuant to the Sentencing Reform Act of 1984:

IT IS ORDERED that the defendant pay to the United States a total fine of twenty five thousand dollars ($25,000.00) consisting of twenty five hundred ($2,500.00) on Counts 1, 2, 3, 6, 7, 8, 9, 11, 12 and 13; the total fine to bear interest as provided by law.

IT IS ADJUDGED that the defendant is hreby committed to the custody of the Bureau of Prisons to be imprisoned for a term of fifty seven (57) months on Counts 1, 2, 3, 6, 7, 8, 9, 11, 12 and 13, each count be served concurrently.

IT IS FURTHER ADJUDGED that upon release from imprisonment; defendant shall be placed on

supervised release for a term of two (2) years on Counts 1, 2, 3, 6, 7, 8, 9, 11, 12 and 13, each count to run concurrently, on the following terms and conditions: (1) defendant shall comply with the rules and regulations of the Probation Office and General Order 318; (2) if the amount of any mandatory assessment, restitution or fine imposed by this judgment remains unpaid at the commencement of the term of community supervision, defendant shall pay such remainder as directed by the Probation Officer; and (3) as directed by the Probation Officer, defendant shall provide to the Probation Officer an accurate financial statement, with supporting documentation, as to all sources and amounts of income and all expenses, and in addition, defendant shall provide federal and state income tax returns as requested by the Probation Officer.

(SEE PAGE 2)

Continued from Page 1

The Court does not order restitution.

Pursuant to Section 5E1.2(f) of the Guidelines, the costs of imprisonment and supervision are waived.

IT IS ORDERED that the defendant pay to the United States a special assessment in the amount of $500.00.

IT IS FURTHER ORDERED that the execution of sentence is stayed to 8/18/97 at 12 Noon, at which time defendant shall surrender to the U.S. Marshal or to the place designated by the Bureau of Prisons.

THE COURT RECOMMENDS that defendant be incarcerated at Talbot County Detention Center in Easton, Maryland.

On the government's motion, the remaining counts of the 1st Superseding Indictment and the original Indictment are ordered dismissed.

STATEMENT OF REASONS

☐ The Court adopts the factual findings and guideline application in the presentence report.

OR

☒ XX The Court adopts the factual findings and guideline application in the presentence report except: (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: 1

Imprisonment Range: 57 to 71 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 15,000 to $ 150,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

☒ Full restitution is not ordered for the following reason(s):

(1) lender's handling of collateral
(2) lender's settlement with the parties which all sides deem to be fair.

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

low-range is adequate sentence

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of

defendant's substantial assistance.

[XX] for the following reason(s):

aggregate of defendant's circumstances warrants a downward departure from the guidelines

Signed by [XX] U.S. District Judge s/ Ronald S.W. Lew

Sherri R. Carter, Clerk

s/ Helena G. Fagan , Deputy Clerk

Dated/Filed May 20, 1997